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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 15-01132-PHX-NVW

Austin Flake and Logan Flake,
Plaintiffs,
vs.
Joseph Michael Arpaio, et al.,
Defendants.

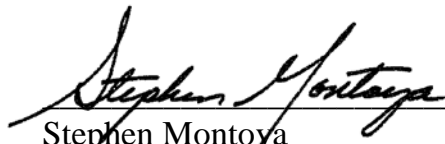
**PLAINTIFFS' REPLY TO
DEFENDANTS' RESPONSE TO
PLAINTIFFS' MEMORANDUM
REGARDING THE
CONSTITUTIONAL BASIS FOR A
MALICIOUS PROSECUTION
CLAIM**

(Oral argument requested)

Plaintiffs submit the following Reply brief regarding the constitutional basis for their malicious prosecution claim under Section 1983, 42 U.S.C. § 1983.

Respectfully submitted this 3rd day of July 2018.

MONTOYA, LUCERO & PASTOR, P.A.


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MEMORANDUM OF POINTS AND AUTHORITIES

Introduction:

This Court's Order of June 21, 2018 directed Plaintiffs to provide the Court with a Memorandum establishing the existence of their constitutional right under the Fourteenth Amendment not to be subjected to malicious prosecution.

Plaintiffs understood this directive to request that Plaintiffs identify the specific constitutional provision upon which they base their federal malicious prosecution claim against Defendants—which Plaintiffs identified as the right not to be deprived of liberty without due process of law under the Fourteenth Amendment. See, e.g., Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc). Having now read Defendants' Response to Plaintiffs' Memorandum, filed just yesterday afternoon, it appears that Defendants are unaware of how Trombi's material misstatements and omissions to the County Attorney actually impacted Plaintiffs' constitutional rights in their everyday lives.

In fact, as explained below, Plaintiffs were deprived of their liberty interests without due process when Trombi's material misstatements and omissions resulted in their indictment and the consequent loss of their rights to freely travel and work as animal care providers.¹

Argument:

The Ninth Circuit has repeatedly recognized that police officers "can be liable [for malicious prosecution] . . . if they made false reports to the prosecutor, omitted material information from the [investigative] reports, or otherwise prevented the prosecutor from exercising independent judgment." Barlow v. Ground, 943 F.2d 1132, 1136 (9th Cir. 1991). See also Borunda v. Richmond, 885 F.2d 1384, 1390 (9th Cir. 1988). Based on this line of cases, this Court vacated its summary judgment order in favor of Trombi on Plaintiffs' Section 1983 claims, explaining that:

¹ These arguments are not new to Trombi, as they were also raised in Plaintiffs' Response to Defendants' Motion for Summary Judgment. See Doc. 114, pp. 5-6.

During the trial, the Court vacated the portion of its order granting summary judgment to Trombi. (Doc. 182.) Vacating that part of the order meant that the 42 U.S.C. § 1983 claim for malicious prosecution could now proceed in a separate trial. The Flakes discovered, late in the first trial, graphs prepared by the Sheriff's Office and the County Attorney's Office that, they say, suggest Trombi was aware the air conditioning failed during the night. Therefore, it was no longer true that there was no evidence Trombi misled the prosecutor or the grand jury when she swore the air conditioning was on all night. *If she did so, the malice requirement under federal law would be satisfied.*

Order of May 31, 2018 (Doc. 279, p. 5, line 24 to p. 6, line 6, emphasis added).

In this case, Trombi intentionally or recklessly told the County Attorney that both a private engineering expert report and the SRP records showed that the air conditioning unit cooling the kennel at the Hughes' home was "on" and "working fine all night"—notwithstanding the substantial objective evidence to the contrary—e.g., the "expert" report by George Hogge (concluding that the A/C "very likely" "froze") and the SRP records (demonstrating that the electrical usage at the Hughes' home on the night the dogs died was consistent with the A/C's failure).

Accordingly—when explaining his decision to voluntarily dismiss the indictment against the Flakes—Maricopa County Attorney Bill Montgomery publicly acknowledged that the "theory of the case" initially presented to the grand jury "did not take into account" the fact that "there were issues with the air conditioning unit" cooling the kennel "raised in recent Defense motions." This admission demonstrates that Trombi's various material misrepresentations and omissions perverted the grand jury process into a deceptive (and hence "malicious") prosecution, as the Court acknowledged the possibility of in the Order of May 31, 2018 quoted above.

When Trombi made material misrepresentations and omissions to the County Attorney, she obviously did so with the intention of obtaining an indictment against the Flakes. After the Flakes were indicted, as a matter of course, the Superior Court entered Final Release Orders that (among other things) deprived them of their constitutional rights

1 to travel and seek gainful employment. Specifically, as a condition of their release, the
2 Superior Court prohibited (among other things) the Flakes from leaving the state of
3 Arizona and from having custody or control of any third-party's animal or pet. See
4 attached Exhibit A.

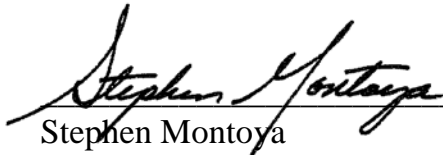
5 “[F]reedom to travel throughout the United States has long been recognized as a
6 basic right under the Constitution.” Dunn v. Blumstein, 405 U.S. 330, 338 (1972). See
7 also Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) (“[t]he Supreme Court has
8 recognized a fundamental right to interstate travel”). As a proximate result of Trombi’s
9 multiple, material misrepresentations and omissions to the County Attorney, the Flakes
10 were deprived of their fundamental constitutional right to leave Arizona at their will.

11 The Supreme Court of the United States has also long recognized an individual’s
12 right to engage in an occupation. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 572
13 (1972) (recognizing that the “liberty” interest guaranteed by the Fourteenth Amendment
14 includes the right “to engage in any of the common occupations of life”), and
15 Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 65 n.4 (9th Cir. 1994) (“it
16 is well-recognized that the pursuit of an occupation or profession is a protected liberty
17 interest that extends across a broad range of lawful occupations”). Based on Trombi’s
18 misrepresentations and omissions, Austin and Logan could no longer care for the pets of
19 third-parties.

20 Accordingly, Trombi’s repeated misrepresentations and omissions to the County
21 Attorney proximately resulted in a deprivation without due process of the Flakes’ liberty
22 interests to travel and engage in an occupation protected by the Fourteenth Amendment to
23 the Constitution of the United States.

Respectfully submitted this 3rd day of July 2018.

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I hereby certify that on July 3, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrants:

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